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January 11, 2022

Submitted via Email and read receipt requested

Stephan Ryba
US Army Corps of Engineers
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ATTN: Regulatory Branch
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New York, N.Y. 10278-0090
Stephen.a.ryba@usace.army.mil

**RE: SERIOUS CONCERNS AND IMMEDIATE REQUESTED ACTION WITH
RESPECT TO SOUTH FORK WIND FARM PERMITTING PROCESS**

Dear Mr. Ryba:

The Citizens for the Preservation of Wainscott (CPW) write to express our serious concerns regarding the South Fork Wind Farm (SFWF), located in eastern Long Island. This offshore project, sponsored by Ørsted and Eversource, will include 12 wind turbine generators, submarine cables, an offshore substation, an alternative current (AC) electric cable and interconnection facility that connects the SFWF to the existing mainland electric grid in East Hampton, New York.¹ Without immediate action before January 18, SFWF will be free to begin on-shore construction, and there is clear evidence that construction could potentially pose significant risks groundwater, which supplies much of the community's drinking water needs. Meanwhile, the United States Army Corps of Engineers (the Corps) has not conducted the legally required analysis to properly understand that risk *before* irrevocable harm could ensue.

We are specifically concerned about the potentially serious environmental and public health impacts resulting from the project's proposed construction of a 138-kilovolt AC transmission cable that will land on a residential road in the hamlet of Wainscott in the Town of East Hampton, New York and burial of the transmission cable in a known area of groundwater contamination related to two state Superfund sites.² In this letter, CPW asks the Corps to do the following:

¹ South Fork Wind Farm and South Fork Export Cable Project: Final Environmental Impact Statement, BOEM 2020-057, Bureau of Ocean Management, U.S. Department of the Interior (Aug. 2021 (SFWF FEIS), at 1-1, available at <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf>.

² *Id.*

- **Immediately pause the issuance of the permits pursuant to Section 10 of the Rivers and Harbors Act (RHA, 33 U.S.C. § 403) and Section 404 of the Clean Water Act (CWA, 33 U.S.C. § 1344) authorizing the discharge of dredged or fill material into waters of the United States. Swift action is needed as this permitting is currently scheduled for January 18, 2022, which will authorize immediate construction of the high-voltage transmission cable. Fortunately, this date is arbitrary and not required by law.³ Instead, the Corps should allow for a reasonable amount of time to conduct a more comprehensive, scientifically based hard-look evaluation as it relates to per- and polyfluoroalkyl substance (PFAS) exposures, monitoring, and containment plans associated with the Beach Lane “proposed action alternative” identified in Bureau of Ocean Energy Management’s (BOEM) Final Environmental Impact Statement (FEIS)/Record of Decision (ROD) for the SFWF;**
- **Pursuant to your Clean Water Act 404(b)(1) guidelines, engage with the Environmental Protection Agency (EPA) to impose mandatory conditions including, but not limited to, a robust monitoring and sampling plan to ensure that, before SFWF receives additional permits, including the 404 permit, federal regulators and the public have an informed, legally required understanding of how construction of the high-voltage transmission line will affect the occurrence and movement of PFAS in the community and the health of local residents; and**
- **Forego adopting BOEM’s FEIS/ROD until the Corps, in conjunction with EPA, conducts monitoring and sampling to understand the full environmental and public health impacts of PFAS contamination in Wainscott associated with construction of the high-voltage transmission line.**

CPW fully supports renewable energy and New York State’s commitment to address the important issue of climate change. Our serious concern arises from SFWF’s reckless and unprecedented proposal to construct a high-voltage transmission line, connecting electricity generated from offshore wind turbines to an onshore substation, directly through a residential community and adjacent to two state Superfund sites. The proposal is especially disconcerting considering CPW has proposed viable alternative routes that avoid residential areas while avoiding any potential environmental and public health concerns from the spread of PFAS.

At the outset of the development of the project, we noted our right to be heard in the permitting process, including during its current stage. The SFWF is a Federal Permitting Improvement Steering Council (FPISC) covered project. As such, a lead, participating, or cooperating agency “shall consider new information received after the close of a comment period” if the information satisfies the “requirements under regulations implementing the National Environmental Policy

³ We are not aware of any current federal requirement or administrative guidance from the Executive Office of the President requiring the Corps to issue a 404 permit within 90 days of BOEM’s ROD. In fact, on September 19, 2021, BOEM submitted a request to the Executive Director of the Federal Permitting Improvement Steering Council (FPISC) requesting an extension to the final completion date for EPA’s action, “issuance of a final decision for permit approval” for the “Outer Continental Shelf (OCS) air permit,” from October 31, 2021, to January 18, 2022.

Act (NEPA).”⁴ Our official correspondence as delineated herein, detailing significant violations of administrative process related to the siting and construction of SFWF’s high-voltage transmission cable, meets these requirements, and thus requires your urgent consideration.

From the start, through every step of a hurried, arbitrary process, the Town Board of East Hampton and the project developers, Ørsted and Eversource, have, with the acquiescence of federal and state officials, largely ignored or downplayed the presence of PFAS in the Town of East Hampton. Instead of fully investigating the potential consequences of routing the transmission cable through a known area of PFAS-contaminated groundwater they seem to have “just gone through the motions” in their examination as to whether construction of the transmission line will affect the disposition of PFAS in the local environment, and ignore alternative cable routes that would avoid PFAS contamination entirely

BOEM skirted its legal obligations under NEPA. NEPA requires all federal agencies, including BOEM, to take a hard look at the “environmental consequences of proposed federal actions, consider alternatives, and publicly disseminate such information before taking final action.”⁵ These steps are undeniably required when providing federal permits for the unprecedented construction of a high-voltage transmission cable from an offshore wind farm through a residential community.

Yet BOEM issued an FEIS/ROD for the SFWF that avoided meaningful discussion and analysis of several issues, including the significant presence of PFAS in soil and groundwater along the construction route of the high-voltage transmission cable. BOEM claimed that the “final EIS analyzes impacts associated with the export [high-voltage transmission] cable over its offshore and onshore portions.”⁶ But it did no such thing. Instead, it brushed aside community concerns, concluding in the FEIS, without evidence or analysis, that environmental impacts “resulting from the Proposed Action alone would be short term to long term and negligible to minor.”⁷

The basis for this conclusion is a mystery, given that BOEM *effectively deferred* consideration of critically important issues, including PFAS contamination, to EPA and the Corps—a step that creates a glaring legal deficiency in the FEIS/ROD. As BOEM itself stated in the FEIS:

BOEM’s obligation is to review the proposed Project as outlined in the COP [Construction and Operations Plan] as well as alternatives that meet the purpose and need. Additionally, before any decision is made on the applications before the USACE, *the USACE will perform all reviews required under the statutory authorities governing its actions. These reviews will consider information in this final EIS.*⁸

(Emphasis added.)

⁴ 42 U.S.C. § 4370m–6(2)(A).

⁵ The Legal Framework of the National Environmental Policy Act, Congressional Research Service, at 1 (updated Sept. 22, 2021), *available at* <https://crsreports.congress.gov/product/pdf/IF/IF11549>.

⁶ SFWF FEIS, *supra* n.1, at I-68.

⁷ *Id.* at H-94.

⁸ *Id.* at I-193.

As we understand it, the Corps is currently preparing a dredge-and-fill permit under Section 404 of the Clean Water Act, which, if granted, would authorize construction of the high-voltage transmission cable. Because BOEM's FEIS/ROD lacks the required thoroughgoing analysis of PFAS contamination tied to the construction of the high-voltage transmission cable, **the Corps cannot use it to inform its analysis supporting the 404 permit.**

As the Corps itself commented, in its role as a cooperating agency in BOEM's EIS process, "Issuance of Section 10 or Section 404 permits *requires NEPA compliance*, which will be met via adoption of BOEM's EIS and issuance of the ROD."⁹ (Emphasis added.) But as noted earlier, BOEM *did not comply* with NEPA. **Therefore, the Corps must remedy the deficiencies in BOEM's EIS by conducting its own supplemental risk analysis, pursuant to its statutory authorities, to determine how the construction of the high-voltage transmission cable will affect pre-existing PFAS contamination in Wainscott.**

If the 404 permit were granted by the Corps as scheduled on January 18, 2022, the Corps, following BOEM, will have ignored clear evidence from monitoring wells directly adjacent to the construction route showing the presence of two types of PFAS chemicals, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS)—at levels above what EPA and the New York State Department of Environmental Conservation (NYSDEC) deem safe.

We note that the Corps, should it choose to issue the 404 permit without conducting a proper review of PFAS contamination, would be disregarding its own policy precedent, *established as recently as last month*. The Corps' Norfolk District and the United States Air Force (USAF) jointly issued a final environmental assessment (EA) under NEPA concerning acquisition of property from the city of Newport News, Virginia. The property was required to expand and enhance the main access gate at Joint Base Langley–Eustis (JBLE-Eustis), Fort Eustis, Virginia.¹⁰

The parallels to the SFWF, particularly as it relates to Wainscott and its PFAS contamination problem, are striking. Both Wainscott and JBLE-Eustis face legacy contamination from "Aqueous Film Forming Foam" (AFFF) used for fire-suppression at airports. As noted above, Wainscott sits adjacent to the East Hampton airport, designated by the state as a Superfund site, because of the airport's longtime use of AFFF, components of which include two types of PFAS: perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), among others. Notably, in 2017, officials from the Suffolk County Department of Health tested private wells in the area and found levels of PFOA and PFOS above the EPA's lifetime health advisory levels for

⁹ *Id.* at A-6.

¹⁰ Final Environmental Assessment for Proposed Access Control Point Main Gate with Property Acquisition, United States Air Force & United States Army Corps of Engineers (Dec. 17, 2021) (Main Gate FEA), *available at* (https://www.jble.af.mil/Portals/46/Documents/Eustis%20Environmental/Pollution%20Prevention-Planning/JBLE-E_acp_main_gate_draft_final_EA_3DEC2021_w_appendices_.pdf?ver=eIOkdJ48rLCqnBmJM9HVLA%3D%3D).

both substances.¹¹ Town residents were offered bottled water as a precaution until the extent of the contamination was more fully understood.¹²

In the EA, the Corps and USAF acknowledge that PFAS “are a source of soil and groundwater contamination at JBLE-Eustis,” and that PFAS “are highly toxic compounds that are components of legacy Aqueous Film Forming Foam (AFFF) that the Air Force used in the 1970s, 80s, and early 90s as a firefighting agent to extinguish petroleum fires.” The EA identified “three potential PFAS release areas.” The Corps and the USAF also conducted a “relative risk evaluation” at each site “that included soil and groundwater sampling to determine the potential risk to public safety, human health, or the environment.”¹³

The Corps must do the same for Wainscott and avoid repeating BOEM’s, as well federal, state, and local officials’, indifference to the long history of PFAS contamination in the Town of East Hampton. As testing of wells in the area has confirmed, PFOA, PFOS and other PFAS compounds have migrated from the airport and adjacent sand and gravel operation and into the surrounding community.¹⁴ The planned SFWF transmission cable alignment passes across the plume of PFAS-contaminated groundwater. Yet, with approval from state and local officials, Ørsted and Eversource have repeatedly claimed, without evidence, that construction activities are unlikely to encounter PFAS—and, even if construction activities did encounter PFAS, the companies claim (again without evidence) that their mitigation plan is sufficient to safely address it.¹⁵

But according to an affidavit filed by geologist John Conrad, SFWF’s “Environmental Management and Construction Plan” includes a monitoring proposal that lacks rigor and contains multiple gaps.¹⁶ For example, Conrad noted “especially large gaps between monitoring wells along the transmission cable corridor in the Wainscott Sand and Gravel area (the ‘Gravel Pit’) where PFAS-contaminated groundwater is known to exist at shallow depths.”¹⁷

He further noted that **“the cable excavation is likely to extend into PFAS-contaminated groundwater known to exist at shallow depth on and near the Gravel Pit.”**¹⁸ (Notably, there are no known studies or analyses that show that SFWF’s construction actions *will likely not*

¹¹ Contaminants Found in Drinking Water Near East Hampton Airport, Joanne Pilgrim, The East Hampton Star (Oct. 11, 2017), *available at* <https://www.easthamptonstar.com/archive/contaminants-found-drinking-water-near-east-hampton-airport>.

¹² Statement from the office of East Hampton Town Supervisor Peter Van Scoyoc (Aug. 3, 2020), *available at* <https://ehamptonny.gov/DocumentCenter/View/5187/Pr-Rel-Aug-2-Statement-from-Supervisor>.

¹³ Main Gate FEA, *supra* n.10 at 3-1.

¹⁴ Hydrologic Assessment of the Wainscott Commercial Center East Hampton, New York, Alpha Geoscience at 8 – 9 (Nov. 2018), *available at* <https://www.dec.ny.gov/data/DecDocs/152250/Report.HW.152250.2018-11-12.Alpha%20Geoscience%20Hydrogeology%20Report%20Wainscott%20Sand%20and%20Gravel.pdf>. *See also* Health Department Expands Water Quality Testing in Wainscott, Kathryn Menu, Sagharbor.com (May 30, 2018), *available at* <https://sagharborexpress.com/health-department-expands-water-quality-testing-wainscott/>.

¹⁵ *See generally* Petitioner’s Reply Memorandum of Law in Further Support of Motion for Stay Pending Appeal (Petitioner’s Reply Memorandum), at 11-16, *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm’n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Jan. 3, 2022).

¹⁶ *See generally* Reply Affidavit of John A. Conrad, attached to Petitioner’s Reply Memorandum, *supra* n.15.

¹⁷ *Id.* at ¶ 14.

¹⁸ *Id.* at ¶ 18.

result in PFOA and PFOS migration stemming from construction activities.) In addition, Conrad concluded that “more work is needed to confirm whether the cable system will be in contact with PFAS-contaminated groundwater in the known PFAS plume area and along the entire route.”¹⁹

Finally, Mr. Conrad conclusively demonstrates that SFWF’s wells and well testing as part of SFWF’s compliance plan fail to meet requirements included in the easement it received from the Town of East Hampton, including installation of wells at 500-foot intervals to measure depth to groundwater and test groundwater samples for PFAS where groundwater is shallow.²⁰ Conrad noted that, as part of the easement, these actions are to be taken *120 days prior to construction*.²¹ “As of the date of the filing of this affidavit [January 3, 2022],” Conrad testified, SFWF “has not satisfied these conditions.”²²

These facts necessitate a delay to give the Corps and EPA appropriate time to gather additional data through monitoring and sampling before issuing the 404 permit. This is especially the case given EPA’s growing concerns, raised publicly throughout the permitting process for the SFWF, regarding the public health impacts from PFAS. They are as follows:

- In October, EPA issued a PFAS Strategic Roadmap.²³ The Roadmap states that PFAS “are an urgent public health and environmental issue” and that EPA’s integrated approach to PFAS is focused on three central directives including pursuing “a comprehensive approach to proactively prevent PFAS from entering air, land, and water at levels that can adversely impact human health and the environment.”²⁴
- On November 16, 2021, EPA transmitted to the EPA Science Advisory Board four draft documents with, as EPA reported, “recent scientific data and new analyses that indicate that negative health effects may occur at much lower levels of exposure to PFOA and PFOS than previously understood.” These new analyses also indicate to EPA that “PFOA is a likely carcinogen.”²⁵
- EPA is planning to develop regulations, and to finalize them “in the spring of 2022,” to determine PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability (CERCLA or Superfund Act).²⁶
- EPA states that they plan to finalize a risk assessment of PFOA and PFOS in November 2024 to determine the potential harm associated with human exposure to chemicals.

¹⁹ *Id.* at ¶ 19.

²⁰ *See id.* at ¶¶ 3, 12, 14.

²¹ *Id.* at ¶ 20.

²² *Id.*

²³ PFAS Strategic Roadmap: EPA’s Commitments to Action 2021 – 2024, U.S. Environmental Protection Agency (PFAS Strategic Roadmap) (Oct. 2021), EPA-100-K-21-002, *available at* https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.

²⁴ *Id.* at 5.

²⁵ EPA Advances Science to Protect the Public from PFOA and PFOS in Drinking Water (Nov. 16, 2021), *available at* <https://www.epa.gov/newsreleases/epa-advances-science-protect-public-pfoa-and-pfos-drinking-water>.

²⁶ PFAS Strategic Roadmap, *supra* n.23, at 13.

- In December, EPA granted a petition from several environmental groups to require testing of PFAS chemicals in North Carolina due to the potential harm to local communities.²⁷

As EPA has explained in its PFAS Roadmap, “hazardous substances” designations for PFOA and PFOS “would require facilities across the country to report on PFOA and PFOS releases that meet or exceed the reportable quantity assigned to these substances.” The hazardous substance designations would also, EPA continued, “enhance the ability of federal, Tribal, state, and local authorities to obtain information regarding the location and extent of releases.”

The Corps would be prudent to delay the planned issuance of the Section 404 permit next week until EPA completes its PFOA and PFOA hazardous designations rulemaking. Moreover, the Corps must know that designating PFOA and PFOS as hazardous substances gives EPA authority to require additional sampling and testing at Superfund sites and adjacent areas. In the case of the SFWF, the limited monitoring and sampling to date, and the testing and remediation promised if SFWF “encounters” PFAS during construction, falls far short of what EPA could require with a new hazardous-substances designation.

These significant issues are not limited to federal permits. We have raised similar concerns about state approvals that were issued without due attention given to serious environmental and public health issues, including contamination from PFAS associated with SFWF’s construction activities. Unfortunately, those concerns were ignored. This forced our hand, as we have filed suit in New York State Appellate Court to stay construction until our concerns have been adequately addressed.²⁸

From the start, through every step of a hurried process, the Town Board of East Hampton and the project developers, Ørsted and Eversource, have, with the acquiescence of federal and state officials, largely ignored or downplayed the concerning presence of PFAS in the Town of East Hampton. We urge you to take a decidedly different course, in which you conduct the legally required steps to gather more data and information about PFAS contamination stemming from this project. This will ensure that, before construction of the high-voltage transmission cable through Wainscott begins, federal, state, and local officials have a complete understanding of the public health issues at stake, and that the citizens of Wainscott are afforded the full protections of the law.

If the Corps were to issue the permit in the face of the procedural and legal defects and known health risks set out above, litigation could ensue. Parties may have no choice but to seek immediate injunctive relief in federal district court to prevent imminent and irreparable harm to

²⁷ Letter Granting Petition, from Michal Freedhoff, Ph.D., Assistant Administrator, Office of Chemical Safety and Pollution Prevention, U.S. Environmental Protection Agency, to Robert M. Sussman, Sussman and Associates (Dec. 28, 2021), available at <https://www.epa.gov/system/files/documents/2021-12/pfaspetitionresponse.pdf>.

²⁸ See *Citizens for the Preservation of Wainscott, Inc. v. N.Y.S. Pub. Serv. Comm’n et al.*, No. 2021-06582 (N.Y. 2d App. Div. filed Sept. 9, 2021); *Citizens for the Preservation of Wainscott, Inc. et al. v. Town Board of the Town of East Hampton et al.*, No. 601847/2021 (N.Y. Sup. Ct. Suffolk Cnty. filed Feb. 1, 2021).

human health and the environment, and to seek a remand to the Corps to remedy these defects and comply with the law and proper policy.

Thank you for your consideration,



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